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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 812 CHR-CLO

CHRISTIAN CORPORATION,

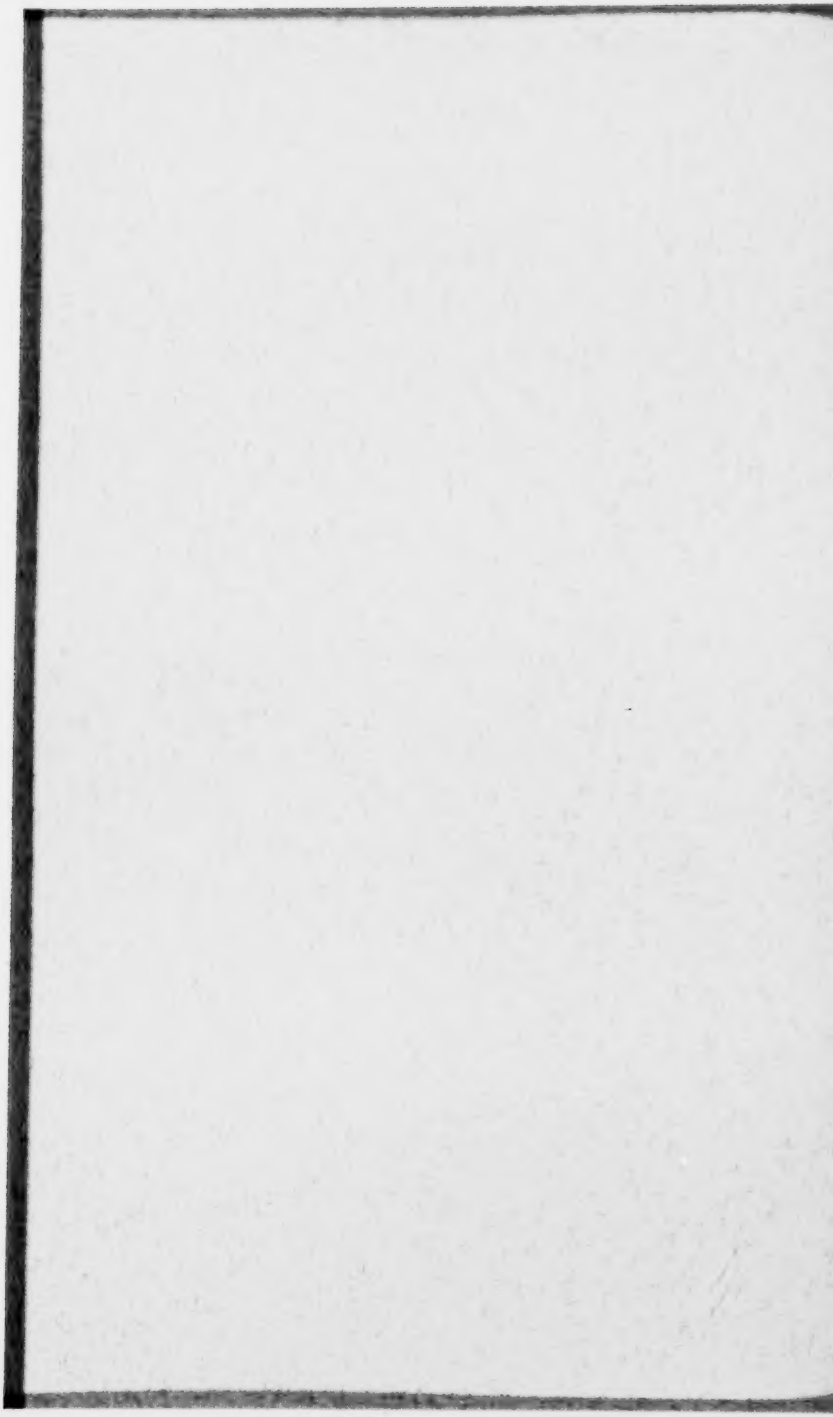
Petitioner,

vs.

COMMONWEALTH OF VIRGINIA AND THE CITY OF RICHMOND.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

M. A. HUTCHINSON,
Counsel for Petitioner.



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OFFICIAL REPORT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 812

CHRISTIAN CORPORATION,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA AND THE CITY OF RICHMOND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Christian Corporation, a Virginia corporation, respectfully petitions this Honorable Court for review on a writ of certiorari of the decision of the Supreme Court of Appeals of Virginia, the court of last resort in the Commonwealth of Virginia, in the case entitled *Christian Corporation* v. *Commonwealth of Virginia and the City of Richmond,* which was heard by that court on an application by your petitioner for a writ of error from a judgment of the Circuit Court of the City of Richmond rendered on August 28, 1941 and finally decided by the Supreme Court

of Appeals of Virginia on October 8, 1941 by a denial of the petition for a writ of error to said judgment of the Circuit Court of the City of Richmond, the effect of which as declared by the Supreme Court of Appeals of Virginia in its order was to affirm the judgment of the said Circuit Court.

I.

Your petitioner files with this, its petition, a certified transcript of the record in the case including the proceedings in said case before the Supreme Court of Appeals of Virginia.

II.

A Summary and Short Statement of the Matter Involved.

Petitioner is a Virginia corporation. Its business is that of a sales agent. It does not stock any merchandise. It represents a number of principals who are located outside of the Commonwealth of Virginia and whose places of manufacture are located outside of the Commonwealth of Virginia. It takes orders for goods manufactured by its principals from residents of Virginia. The orders are solicited and when received are sent to your petitioner's principals who pass on the financial responsibility of the persons giving the orders and decide whether the orders will be accepted or rejected. If accepted, petitioner's principals ship the merchandise from the place of manufacture outside of the Commonwealth of Virginia to the purchaser inside Virginia. The merchandise is billed by the principal and petitioner has nothing to do with the billing of such goods. On the 10th of each month petitioner receives a commission from its principals based on the business obtained by petitioner. (See the testimony of L. L. Christian R. 17-20)

Petitioner maintains an office in the City of Richmond. The office has on the door petitioner's name and the name

of Mr. John Christian who has an office in the suite occupied by petitioner. The letterheads of petitioner in addition to containing its name, have the words "Manufacturers Agents." (R. 17-18)

The Commonwealth assessed petitioner as a commission merchant under Section 174 of the Tax Code with a license tax in the amount of One Hundred Seventy-five Dollars and Ninety Cents ($175.90). The City of Richmond assessed petitioner with a City license tax of One Hundred Twelve Dollars and Fifty-eight Cents ($112.58) plus a penalty of Five Dollars and Sixty-three Cents ($5.63) under Section 22 of the City License Ordinance. These assessments were based on the interstate business of petitioner. (R. 14-16)

Petitioner paid the State license tax and then filed a petition under Section 410 of the State Tax Code to recover the same. The City license tax had not been paid by petitioner and a petition was filed praying for an exoneration from the payment of the same. Both petitions were based on the ground that petitioner's business was interstate commerce and that it was not subject to either State or municipal taxes for the privilege of engaging in interstate commerce. (R. 6-7, 9-10)

In the petition filed with the Supreme Court of Appeals of Virginia your petitioner pointed out that the only issue involved in the cases at bar was the question of whether persons engaged in interstate commerce may be taxed by the Commonwealth of Virginia and the City of Richmond for the privilege of engaging in interstate commerce. These cases present a question which arises under the Constitution of the United States and involves rights of the petitioner which arise under that instrument. The attention of the Supreme Court of Appeals of Virginia was specifically directed to the fact that the question involved is

one of constitutional law and that it was the contention of petitioner that the license taxes imposed upon it by the Commonwealth and the City of Richmond were void exactions as being in conflict with the Constitution of the United States as construed by this Court which is the final arbiter as to the question presented by the issue here. (R. 3)

The errors assigned in the petition for a writ of error presented by your petitioner to the Supreme Court of Appeals of Virginia were as follows: (R. 3)

> "1. Petitioner assigns as error the action of the Trial Court in holding that its business, although interstate commerce, was subject to license taxation by the Commonwealth and the City of Richmond for the privilege of carrying on such business.
> "2. The Commonwealth's statute and the City Ordinance, under which petitioner is taxed as construed by the trial Court, are in conflict with the Commerce Clause of the Federal Constitution, and therefore void enactments so far as they affect interstate commerce or those engaged in such commerce.
> "3. In holding petitioner subject to taxation the trial Court overruled the decisions of the Supreme Court of the United States, which Court is the final arbiter as to rights arising under the Federal Constitution and its adjudications of such rights binding on all Courts and not to be disregarded."

The petition for a writ of error in the cases at bar was filed with the Supreme Court of Appeals of Virginia on or about the 5th day of September, 1941 within the time allowed by law for the filing of the same. The petition and record were under consideration by that court until October 8, 1941, when the writ was denied (R. 32). The order entered by the Supreme Court of Appeals after reciting that the matter had been maturely considered reads:

> "* * * the Court being of opinion that the said judgment is plainly right doth reject said petition and re-

fuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

III.

The basis upon which it is contended that this Court has jurisdiction upon application for a writ of certiorari to review the judgment in question.

It is believed that the foregoing statement of facts fully discloses that petitioner is engaged in interstate commerce and that the license taxes imposed upon it by the Commonwealth of Virginia and the City of Richmond were levied upon it solely for the privilege of engaging in interstate commerce. Petitioner relies upon the Constitution of the United States, Article I, Section 8, Clause 3 and the decisions of this Court construing and applying that Section of the Constitution to facts similar to those in the cases at bar, namely:

Stockard v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. 576 (1902).

Robins v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. 592, 1 Inters. Com. Rep. 45 (18—).

Brown v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1827).

Welton v. *Missouri*, 91 U. S. 275, 23 L. ed. 347 (1875).

Davis v. *Virginia*, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. 497 (1915).

Stewart v. *Michigan*, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. 476 (1914).

Crenshaw v. *Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. 294 (1913).

Rogers v. *Arkansas*, 227 U. S. 401, 57 L. ed. 569, 33 Sup. Ct. 298 (1913).

Caldwell v. *North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. 229 (1903).

Real Silk Hosiery Mills v. *Portland*, 268 U. S. 325, 69 L. ed. 982, 45 Sup. Ct. 525 (1925).

Cooney v. *Mountain States Telephone & Telegraph Company*, 294 U. S. 384, 55 Sup. Ct. 477 (1935).

Gwin, White and Prince v. *Henneford*, 305 U. S. 434, 59 Sup. Ct. 325, 327 (1939).

McGoldrick v. *Berwind-White Coal Mining Company*, 309 U. S. 33, 60 Sup. Ct. 388, 397 (1940).

The effect of the ruling of the Circuit Court of the City of Richmond and of the Supreme Court of Appeals of Virginia in affirming the judgment of the Circuit Court of the City of Richmond was to deny your petitioner the protection of the Commerce Clause of the United States Constitution and to overrule the decisions of this Court cited above in which it was held that persons engaged in business similar to that conducted by your petitioner were protected from taxation by the Commerce Clause of the United States Constitution from taxation by States and municipalities for the privilege of engaging in interstate commerce.

IV.

Statement of the grounds upon which it is contended that the questions involved are substantial.

Your petitioner is engaged in interstate commerce. It has been taxed by the Commonwealth of Virginia and the City of Richmond for the privilege of engaging in interstate commerce. The license taxes imposed upon petitioner for the privilege of engaging in such commerce are under the alleged authority of Section 174 of the Tax Code of Virginia and Section 22 of the Richmond City Ordinance (R. 3, 4). Both the statute and the ordinance impose a flat license tax and an additional tax based upon the percentage of the gross earnings in excess of One Thousand ($1,000.00) Dollars.

When a State or municipality deprives one of a right guaranteed him by the Constitution of the United States the question involved is always substantial. As was said by this Court in *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, 69 L. ed. 916, 44 A. L. R. 1219 (1925):

> "The amount demanded is unimportant when there is no legitimate basis for the tax. * * *."

V.

The stage in the proceedings in the court of first instance and in the Appellate Court at which and in the manner in which the Federal questions sought to be reviewed were raised.

The Federal question here invoked was raised in the petition filed in the Circuit Court of the City of Richmond praying for the correction of the assessments made against petitioner (R. 6-7, 9-10). The question was therefore raised at the earliest stage of the proceeding. The trial court denied the relief prayed for in the petition (R. 29-30). Petitioner thereupon applied to the Supreme Court of Appeals of Virginia for a writ of error to the judgment of the Circuit Court. The question here involved was again raised in said petition for a writ of error, the entire petition (R. 5-13) being devoted to a statement of facts, the assignments of error and a discussion of the decisions of this Court which have construed the Commerce Clause of the United States Constitution applied to facts similar to those in the cases at bar.

It has been decided by the Supreme Court of Appeals of Virginia that a petition for a writ of error is in the nature of a pleading—*Thurston* v. *Woodward*, 139 Va. 315 (1924). The method of raising the Federal question sought to be reviewed was therefore raised by the pleadings filed in the

trial court, by the evidence introduced therein, and, in the Appellate Court by the petition for a writ of error, which is in the nature of a pleading, accompanied by a certified copy of the transcript of the record of the cases in the Circuit Court of the City of Richmond. A certified copy of the record of the entire proceedings in the trial court and in the Supreme Court of Appeals of Virginia accompanies this petition for a writ of certiorari. The issue raised by petitioner was passed upon by the Circuit Court of the City of Richmond by denying to petitioner the relief prayed for (R. 29-30). The Supreme Court of Appeals of Virginia passed upon the matter by denying to petitioner a writ of error to said judgment, the effect of which was to affirm the judgment of the said Circuit Court (R. 32). The opinion of the Circuit Judge (R. 30-31) clearly shows that the said Circuit Court decided on the authority of *Dunston* v. *City of Norfolk*, 177 Va. 689, decided by the Supreme Court of Appeals of Virginia on June 9, 1941, that one engaged in interstate commerce was no longer protected from State and local taxation for the privilege of engaging in such commerce. The Supreme Court of Appeals of Virginia gave no reason in its order denying petitioner's application for a writ of error, other than the statement, that after having examined the petition and the transscript of the record and maturely considered the same that the Court was of the opinion that the judgment of the Circuit Court was plainly right (R. 32). Examination of the opinion of the majority of the Court in *Dunston* v. *City of Norfolk*, 177 Va. 689 (1941) reveals the fact that the majority of the Court holds that persons engaged in interstate commerce are now subject to license taxes imposed by the Commonwealth of Virginia and its localities for the privilege of engaging in such commerce. The Chief Justice and one of the Associate Justices dissented, 177 Va. 701-709.

The trial court delivered a written opinion in the case, (R. 30-32) that part relating to the question here raised being found in the paragraph beginning near the bottom of page 31-32. The Supreme Court of Appeals did not deliver an opinion in the case but entered an order denying the application for a writ of error (R. 32). The opinion in the Case of *Dunston* v. *City of Norfolk* referred to by the trial court in its opinion is found in 177 Va. 689, 701. The dissenting opinion of the Chief Justice and of Mr. Justice Browning is found in 177 Va. 701-709.

VI.

The Dates of the Orders Complained Of.

The petitions were filed in the Circuit Court of the City of Richmond on April 10, 1941 (R. 5-8). The relief prayed for was denied by order of the Circuit Court of the City of Richmond entered on August 28, 1941 (R. 29-30). A writ of error was applied for on September 5, 1941 and the petition for a writ of error was denied on October 8, 1941:

> "* * * the effect of which is to affirm the judgment of the said Circuit Court." (R. 32)

A petition may be presented to the Supreme Court of Appeals of Virginia for a writ of error to any final judgment which shall have been rendered not more than four (4) months before the petition is presented. Section 6337 of the Code of Virginia, 1919 as amended by the Acts of Assembly of Virginia, 1938, page 134, 1940 Supplement to the Virginia Code of 1936 Annotated (Michie) page 449.

VII.

Assignments of Error.

Your petitioner assigns as error the same errors assigned by it in its application for a writ of error filed with the

Supreme Court of Appeals of Virginia and quoted above, the grounds thereof being that the taxes levied upon it deprives it of a right to which it is entitled under the Commerce Clause of the Constitution of the United States.

Your petitioner respectfully points out to the Court that the purpose of incorporating the Commerce Clause into the Constitution of the United States was to prevent the several States from interfering with and throttling commerce between the States. At an early date in our history this Court declared that no State could levy a tax upon any person for the privilege of engaging in interstate commerce. This rule has been applied by this Court in an unbroken line of decisions from *Brown* v. *Maryland,* 12 Wheat. 419, 6 L. ed. 678.

Under the Commerce Clause of the United States Constitution as interpreted by this Court, the United States has developed into the greatest and richest nation in the world. Those familiar with the subject have little doubt that the Commerce Clause of the United States Constitution as construed by this Court in the past, has been the chief contributing factor to the development of interstate commerce and to the free exchange of products of this country in all parts thereof and upon which the prosperity and general welfare of the nation is founded. So dangerous have tax laws of the type enforced here been regarded by this Court, that it has heretofore always condemned every law that has heretofore come before it which imposed a levy for the privilege of carrying on interstate commerce. Nowhere in the reports of this Court can there be found a decision which holds that a State or its localities can levy a tax upon any person for the privilege of engaging in interstate commerce. All of the decisions of this Court are to the contrary. Even the opinion in *McGoldrick* v. *Berwind White Coal Mining Company,* 307 U. S. 33, 60 S. Ct. 388, 64 L. ed. 565 (1940) has recognized the wisdom, justice and validity of this rule.

A supporting brief accompanies this petition.

Your petitioner, therefore, respectfully prays that this Honorable Court will review the decision of the Supreme Court of Appeals of Virginia complained of in the cases at bar on a writ of certiorari and that it will set aside and annul the decision of the Supreme Court of Appeals of Virginia and declare that your petitioner is not subject to taxation either by the Commonwealth of Virginia or by the City of Richmond for the privilege of engaging in interstate commerce. And your petitioner will ever pray, etc.

CHRISTIAN CORPORATION,
A Virginia Corporation,
By L. L. CHRISTIAN,
Vice-President.

M. A. HUTCHINSON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 812

CHRISTIAN CORPORATION,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, AND THE CITY OF RICHMOND,

Respondents.

PETITIONER'S BRIEF TO ACCOMPANY PETITION FOR A WRIT OF CERTIORARI.

This is an application for a writ of certiorari to review the action of the Supreme Court of Appeals of Virginia, the court of last resort of that State, in refusing petitioner a writ of error to a judgment of the Circuit Court of the City of Richmond, holding that petitioner was subject to license taxes by the Commonwealth of Virginia and by the City of Richmond for the privilege of engaging in interstate commerce.

A Brief Statement of Facts.

The facts have already been fully summarized in the petition for a writ of certiorari (pp. 2-4). The record there referred to shows that petitioner is a sales agent or drum-

mer engaged in interstate commerce, and that the Commonwealth of Virginia and the City of Richmond have imposed upon it fixed sum and percentage license taxes for the privilege of engaging in interstate commerce. Petitioner has an office in Richmond, Virginia. It represents principals whose places of manufacture are outside of the boundaries of the Commonwealth of Virginia. It takes orders for goods which its principals manufacture or sell. At the time the orders are taken the goods are outside of the Commonwealth of Virginia. The orders are forwarded by petitioner to its principals in other States. The orders are accepted or rejected by the principals and if the orders are accepted, the goods are shipped in interstate commerce from outside of Virginia to the purchasers in Virginia, and petitioner is paid a commission for having obtained the orders (R. 17-21).

The Virginia Statute and the Richmond City Ordinance under which the license taxes complained of were imposed.

The Virginia Statute under which petitioner was assessed with license taxes is Section 174 of the Tax Code of Virginia, found in the Appendix to the Virginia Code of 1936 (Michie) and reads as follows:

> "Commission merchants and brokers.—Every person, firm or corporation, doing business in this State who receives or distributes provisions and merchandise, including flour, hay or grain, shipped to such person, firm or corporation for distribution on account of the shipper, or who participates in the profits, ensuing from or accruing out of the sales of such provisions or merchandise, including flour, hay or grain, or who invoices such sales or collects the money therefor, shall be deemed to be a broker who receives or distributes provisions and merchandise, including flour hay, or grain.

"Every person, firm or corporation, buying or selling for another any kind of merchandise, on commission, except associations or organizations of farmers, including produce exchanges, organized and maintained by farmers for mutual help in the marketing of their produce and not for profit, shall be a commission merchant. Any person, firm or corporation licensed as a commission merchant may sell any personal property which may be left with, or consigned to him for sale, except gold or silver coin, bonds, certificates of public or private debts or other securities; provided, however, that any such merchant may sell gold or silver coin, certificates of public or private debts or other securities, by taking out the license therefor prescribed in the case of stock brokers.

"Every person, firm or corporation shall pay for the privilege of transacting the business of a commission merchant or broker the sum of fifty dollars, provided the commissions for the preceding year did not exceed one thousand dollars, but when the commissions exceeded one thousand dollars the tax shall be fifty dollars, and an additional tax at the rate of one dollar for each hundred dollars or fraction thereof, of commissions in excess of one thousand dollars, and if the license is to include the privilege of selling gold or silver coins, bonds, certificates of public or private debts, or other securities, there shall be paid, in addition, the amounts required in each case to be paid by stock brokers and in like manner.

"The license tax on every commission merchant or broker beginning business shall be the flat tax above prescribed, plus a tax in accordance with the foregoing scale measured by the commissions which it is estimated he will receive from the time he commences business to the following December thirty-first. (Tax Bill, secs. 48, 49; 1914, p. 487; 1915, p. 232; 1922, p. 109.)"

The Richmond city ordinance under which the license tax was imposed is Section 22 of Chapter 10 of the Rich-

mond City Code of 1937 (as amended, and reads as follows:

> "AGENTS—Sales Agents or Agencies.—Persons, firms or corporations engaged in business as sales agents or agencies * * * $50.00 and one-half of one percentum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. (December 15, 1933.)"

Prior to 1941 the Supreme Court of Appeals of Virginia held in *Adkins* v. *City of Richmond*, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 A. S. R. 702 (1900) and *Castner* v. *Commonwealth*, 138 Va. 81, 121 S. E. 894 (1924) that neither the Commonwealth nor the City of Richmond could lawfully impose any license tax for the privilege of engaging in interstate commerce. These decisions were strictly in accordance with an unbroken line of decisions by this Court hereinafter referred to. During the year 1940 the administrative officials of the Commonweatlh of Virginia and of the City of Richmond concluded that the Commonwealth and the City had the lawful right to impose license taxes for the privilege of engaging in interstate commerce, and thereupon proceeded to overrule the aforesaid decisions of the Supreme Court of Appeals of Virginia and of this Court. About the same time the administrative officials of the City of Norfolk reached a similar conclusion and took similar action.

In *Dunston* v. *The City of Norfolk*, 177 Va. 689 (1941) the Supreme Court of Appeals of Virginia by a divided Court held that the administrative officials of the City of Norfolk had properly overruled the previous decisions of the Supreme Court of Appeals of Virginia and of this Court and held that interstate commerce was no longer protected by the Commerce Clause of the Constitution of the United

States. The Chief Justice and one of the Associate Justices filed a vigorous dissenting opinion in 177 Va. 701-709. The Supreme Court of Appeals of Virginia thereafter refused petitioner a writ of error in the cases at bar the effect of which was to affirm the judgment of the Circuit Court of the City of Richmond holding that persons engaged in interstate commerce were now subject to license taxation by the Commonwealth of Virginia and the City of Richmond for the privilege of engaging in such commerce.

Assignments of Error.

Petitioner assigns as error the action of the trial court and of the Supreme Court of Appeals of Virginia in holding that it is subject to license taxation by the Commonwealth of Virginia and the City of Richmond for the privilege of engaging in interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the decisions of this Court holding that States and municipalities are without authority to impose license taxes upon persons engaged in interstate commerce for the privilege of engaging in such commerce.

The Law of the Case.

The direct question here involved has been settled by the decision of this Court in *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. Ed. 785, 22 Sup. Ct. 576 (1902). This case is directly in point and adjudicates the issue in the case at bar. It has never been overruled. It has been frequently cited with approval by this Court, the last time in the majority opinion in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388, 397 note 11 (1940).

In *Stockard* v. *Morgan, supra*, complainants, residents of the State of Tennessee were engaged as agents and brokers for the sale of property of nonresident principals. The case

was submitted to the Court on the following agreed statement of facts, 185 U. S. 28-30, 46 L. Ed. 787-89:

" 'The complainant, as the representative of nonresident parties, firms or corporations, solicits orders for goods from jobbers or wholesale dealers in Chattanooga, Tennessee, and when such orders are obtained sends them to his nonresident principal or principals. If an order is accepted the goods are shipped by such nonresident principal or principals to the local jobber or wholesale dealer. Up to the time of the sale the goods in all instances belong to the nonresident principal or principals, and are shipped to the state of Tennessee from another state.

" 'In making sales or soliciting orders for the goods the complainant sometimes exhibits samples to the local jobber or wholesale dealer, and sometimes takes the orders without showing a sample.

" 'Unless complainant has been previously authorized by the principal or principals to sell at a fixed price, the orders are taken subject to acceptance or rejection by such nonresident principal or principals, who own the goods.

" 'At the end of each month, or at stated periods, the complainant is paid a commission by such nonresident principal or principals for goods previously sold on accepted orders. No commission is paid on orders taken but rejected. Complainant does not receive for his services any pay or salary from any local jobber or dealer or resident of Tennessee, nor does he assume to represent or represent or hold himself out as representing, any resident of Tennessee, or negotiate any sales of goods for residents of Tennessee. His principals are all residents of other states of the United States, and the goods sold are shipped from such other state to the state of Tennessee for delivery to buyers who reside in Tennessee.

" 'The complainant has an office or 'headquarters' in Chattanooga, Tennessee, where he keeps samples, stationery, and other articles; but he travels around on

foot daily or frequently in drumming or soliciting orders for goods, as before stated. His principals are specific parties, firms, or corporations, all nonresidents of Tennessee and residents of other states in the United States, and he does not represent or hold himself out as representing the public in general, or negotiate or sell for any resident of Tennessee.

" 'The defendants and solicitors for the state of Tennessee and Hamilton County contend that, under the facts, the complainants are 'merchandise brokers,' and each of them is bound for privilege taxes under the laws of Tennessee.

" 'That J. H. McReynolds should pay a privilege tax for 1900 to the state of $20, and to the county of $20.

" 'That Stockard & Jones should pay to the state $20 for each of the years 1897, 1898, 1899 and 1900, and a like sum for each of said years to the county of Hamilton.

" 'That each of the other complainants owe the same sums as Stockard & Jones.

" 'That all of the complainants should be held for proper penalties, costs, and attorneys' fees if they are held liable for such taxes.

" 'The complainants contend that they are engaged exclusively in interstate commerce, and are not bound for such privilege taxes; further, that the revenue laws of Tennessee applicable *to 'merchandise brokers' do not include these complainants, so as to make them subject to privilege taxes, but even if such laws do include complainants, yet they are inoperative and void as against complainants, who are engaged solely in interstate commerce.' "

In holding the complainant's business not subject to tax, the Supreme Court said, 185 U. S. 30-34, 46 L. Ed. 791-793:

"In this case we are bound to give the same meaning to the state statute that was given to it by the supreme court of the state, and the question which remains for us to decide is whether, as so construed, the statute violates any provision of the Federal Constitution.

"We think it violates the interstate commerce clause of the Constitution of the United States, and that this Court has in several cases decided the principle which invalidates the statute so far as it affects the business of the complainants. The principle is contained in the cases of *Brown* v. *Maryland*, 12 Wheat, 419, 6 L. ed. 678, and *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347. Subsequently the case of *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Comm. Rep. 45, 7 Sup. Ct. Rep. 592, was decided, which is one of the leading cases upon the subject now in hand, and we think that it is decisive of the case before us. That case was tried upon an agreed statement of facts as follows:

" 'Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of ——, 1884, was engaged in the business of drumming in the taxing district of Shelby county, Tennessee, i. e., soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins, & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force, and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins, & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the taxing district of Shelby county, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest.'

"The court held upon these facts that the statute of Tennessee of 1881, enacting that 'all drummers and all persons not having a regular licensed house of business in the taxing district 'of Shelby county,' offering for sale, or selling goods, wares, or merchandise therein

by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25.00 per month, for such privilege,' was void as against Robbins.

"The opinion of the court was delivered by Mr. Justice Bradley, in the course of which he said (p. 494, L. ed. p. 696, Inters. Com. Rep. p. 47, Sup. Ct. Rep. p. 594):

" 'In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, *except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one state to sell his goods in another state, without in some way obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell

them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course.

"'In certain branches of business it may adopt it with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and *wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things.'

"And again at p. 496, L. ed. p. 697, Inters. Com. Rep. p. 47, Sup. Ct. Rep. p. 595:

"'But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making nego-

tiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States Marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.'

"Other cases followed the Robbins Case, among them *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118; *Leloup v. *Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380; *Asher* v. *Texas,* 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall* v. *California,* 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co.* v. *Pennsylvania,* 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. These cases exhibit different phases of the same general principle, but all follow that principle as announced in the Robbins Case, and deny the right of the state to tax people representing the owners of property outside of the state, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the state. We think they cover the facts of the case at bar, and render the statute as construed by the state court invalid so far as it affects the business of the complainants described in the agreed statement of facts above set forth."

This Court further said, 185 U. S. 35-36, 46 L. Ed. 794:

"We attach no importance to the fact that in the Robbins Case the individual *taxed resided outside of the state. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the state affect the question. If while so acting and soliciting orders within the state for the sale of property for one nonresident of the state, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being nonresidents of the state of Tennessee. The fact that the state or the court may call the business of an individual, when employed by more than one person outside of the state, to sell their merchandise upon commission, a 'brokerage business,' gives no authority to the state to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley, in the Robbins Case, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592: 'The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce?' It is still a carrying on of interstate commerce, whether the party is acting for one or more principals residing outside of the state and selling their goods through his procurement, acting for them as their agent."

It is also said, 185 U. S. 37, 46 L. ed. 794:

'Although it is said in the opinion of the state court herein that the thing taxed is the occupation of mer-

chandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the state selling the goods of his principal who is a nonresident of the state, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax upon the occupation of the individual residing within the state while acting as the agent of a nonresident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.

* * * * * * *

"Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the state."

The same result was reached in *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325, 69 L. Ed. 982, 45 Sup. Ct. 525 (1925) in which this Court held that a State statute requiring persons going from place to place soliciting orders for goods and receiving payment or any deposit of money in advance, to secure a license and give bond conditioned for final delivery of the goods ordered, violates the Commerce Clause of the Federal Constitution in so far as it was made to apply to agents soliciting orders in a State to be forwarded to a manufacturer in another State to be filled by C. O. D. shipments and that it was immaterial that the solicitors traveled at their own expense and received their compensation through retention of advance partial payments on goods ordered.

The decision of this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 60 Sup. Ct. 388, 393 (1940), neither overruled nor discredited the above cited decisions of this Court. On the contrary, Mr. Justice, now

Mr. Chief Justice Stone, in the majority opinion said, 309 U. S. 33, 47, 60 Sup. Ct. 393:

> "Certain types of tax may, if permitted at all so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminated against the commerce *or impose a levy for the privilege of doing it*, or tax interstate transportation or communication or their gross earnings or levy an exaction on merchandise in the course of its interstate journey. * * *" (Italics supplied.)

See also the discussion of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694 (1887), in the majority opinion in *McGoldrick* v. *Berwind White Coal Mining Co.*, 309 U. S. 55-57, 60 Sup. Ct. 397-398. Nothing is there said about overruling that case or the other cases we have cited. On the contrary the authority of these cases is recognized when the issue presented as here involves a license tax imposed by a State or municipality for the privilege of engaging in interstate commerce.

See also:

Davis v. *Virginia*, 236 U. S. 697, 35 Sup. Ct. 497, 59 L. Ed. 795 (1915), opinion by Mr. Justice Holmes;

Stewart v. *Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786 (1914);

Crenshaw v. *Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565 (1913);

Rogers v. *Arkansas*, 227 U. S. 401, 33 Sup. Ct. 298, 57 L. Ed. 569 (1913);

Caldwell v. *North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336 (1903).

In addition to the foregoing cases, Mr. Chief Justice Stone in note 11 to the majority opinion in *McGoldrick* v.

Berwind-White Coal Mining Co., 309 U. S. 33, 56, 60 Sup. Ct. 388, 397, cites as in accord with the rule laid down in *Stockard* v. *Morgan, supra,* the following cases:

Corson v. *Maryland,* 120 U. S. 502, 7 Sup. Ct. 665, 30 L. Ed. 699 (1887);

Asher v. *Texas,* 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368 (1888);

Stoutenberg v. *Hennick,* 129 U. S. 144, 9 Sup. Ct. 256, 32 L. Ed. 637 (1889);

Brennan v. *Titusville,* 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719 (1894);

DiSanto v. *Pennsylvania,* 273 U. S. 34, 39, 47 Sup. Ct. 267, 269, 71 L. Ed. 524 (1927);

Caldwell v. *North Carolina,* 187 U. S. 622, 632, 23 Sup. Ct. 229, 233, 47 L. Ed. 336 (1903).

Referring to the cases cited in note 11, Mr. Chief Justice Stone, speaking for the Court, said, 309 U. S. 56-57, 60 Sup. Ct. 397-398 (1940):

> "In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 625, 54 S. Ct. 542, 545, 78 L. Ed. 1025, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, 34 S. Ct. 596, 58 L. Ed. 985; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, with *Schollenberger* v. *Pennsylvania,* 171 U. S. 1, 18 S. Ct. 757, 43

L. Ed. 49; *Robbins* v. *Shelby County Taxing District, supra; Sprout* v. *South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45. It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District, supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare *Robbins* v. *Shelby County Taxing District, supra*, with *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601, see *Howe Machine Co.* v. *Gage, supra; Wagner* v. *Covington, supra;* and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case."

In note 11 to the majority opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., supra*, after referring to *Robbins* v. *Shelby County Taxing District, supra*, and the other cases above referred to, Mr. Chief Justice Stone, speaking for the Court, said, 309 U. S. 56, 60 Sup. Ct. 397:

"* * * Read in their proper historical setting these cases may be said to support the view that this kind of a tax is likely to be used as 'an instrument of discrimination against interstate or foreign commerce,' * * *".

Section 296 of the Virginia Tax Code, Appendix to the Virginia Code of 1936 (Michie), provides as follows:

"City and town licenses.—In addition to the State tax on any license, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same, and require a license to be obtained therefor; and in any case in which they see fit, require from the person licensed, bond, with sureties, in such penalty and with such condition as they may deem proper, or make other regulations concerning the same.

"No city or town shall impose upon or collect from any person any tax, fine or other penalty for selling farm or domestic products within the limits of any such town or city outside of the regular market houses and sheds of such city or town; provided, such products are grown or produced by such person.

"No city or town shall require a license to be obtained for the privilege or right of printing or publishing any newspaper. (Code 1919, secs. 3072, 3062.)"

There are twenty-four (24) cities in Virginia, *Report of the Secretary of the Commonwealth of Virginia, 1939-1940*, pages 269-284. There are one hundred and ninety-one (191) incorporated towns in Virginia, *Report of the Secretary of the Commonwealth of Virginia, 1939-1940*, pages 285-325. It, therefore, clearly follows that one engaged in the soliciting of orders for goods in interstate commerce in the Commonwealth of Virginia could, in addition to being taxed for the privilege of engaging in interstate commerce, be subjected to two hundred and fifteen (215) additional taxes for the same privilege if he undertook to carry on his business in all parts of the Commonwealth as he clearly has a right to do. If the Commonwealth of Virginia and the City of Richmond may lawfully impose license taxes upon petitioner for the privilege of engaging in interstate commerce in the Commonwealth of Virginia and in the City of Richmond, then under Section 296 of the Virginia Tax Code quoted above every other city and town in the Commonwealth of Virginia in which petitioner solicits orders for its principals may tax petitioner for the privilege of soliciting such orders even though the solicitation of such orders is exclusively interstate commerce.

As was well said by the Supreme Court of Appeals of Virginia in *Fugate* v. *Weston*, 156 Va. 107, 110 (1931):

"When we come to weigh a statute, the question is not what has actually been done under it, but what

might have been done. *Violett* v. *Alexandria,* 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825."

It is clearly apparent "that this kind of a tax is likely to be used as 'an instrument of discrimination against interstate or foreign commerce.' "

In *Lyng* v. *Michigan,* 135 U. S. 161, 10 Sup. Ct. 725, 34 L. ed. 150 (1890) this Court said:

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, *or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs to Congress.*" (Italics supplied.)

In *Cooney* v. *Mountain States Telephone & Telegraph Co.,* 294 U. S. 384, 55 S. Ct. 477 (1935), this Court held that where a tax is exacted from one doing both interstate and intrastate business it must appear that the taxes were imposed solely on account of the intrastate business, and that the amount exacted is not increased because of the interstate business done. In so holding, this Court said (55 Sup. Ct. 481-482):

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Port of Mobile,* 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.'

Id., page 647 of 127 U. S., 8 S. Ct. 1380, 1383. See *Williams* v. *Talladega*, 226, U. S. 404, 419, 33 S. Ct. 116, 57 L. Ed. 275. Where the tax is exacted from one doing both an interstate and intrastate business it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend, Ind.*, 277 U. S. 163, 171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 51 S. Ct. 499, 75 L. Ed. 1171."

In the case of *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 59 S. Ct. 325, 327 (1939), a case that involved a Washington Statute imposing a tax of one-half of 1% on the gross income of the business of any person engaged in business activities in Washington, this Court, speaking through Mr. Justice, now Mr. Chief Justice Stone, the author of the majority opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* said:

"For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, 6 L. Ed. 678, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344, 26 L. Ed. 565; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Robbins* v. *Shelby County Taxing District, supra; Leloup* v. *Mobile*, 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed. 311; *Brennan* v. *Titusville*, 153 U. S. 289, 14 S. Ct. 829, 38 L. Ed. 719; *International Text-Book Co.* v. *Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A., N. S., 493, 18 Ann. Cas. 1103; *Fisher's Blend Station* v. *State Tax Commission, supra; Adams Manufacturing Co.* v. *Storen, supra.* For half a century, following the decision in *Philadelphia & S. M. Steam-*

ship Co. v. *Pennsylvania*, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. * * *"

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 69 L. Ed. 916, 44 A. L. R. 1219 (1925), this Court said, in discussing the subject of taxes based upon interstate transactions:

"The amount demanded is unimportant when there is no legitimate basis for the tax. * * *"

The issue here presented does seem to warrant the observation that once the rule of law so long adhered to is relaxed there surely will follow consequences of far reaching importance to the future well being and general prosperity of the Nation as a whole. Interstate commerce has been and must continue to be the very life blood of the Nation. To retard, hamper and destroy the normal and natural flow of interstate commerce must of necessity affect the matter of national interest and security. It then follows that if the matter be vital to this Nation, made up as it is of a number of States and subordinate county and municipal governments that we guard with jealous care the lanes of communication over which and through which the stream of interstate commerce must flow. In this way only can the right of one individual to trade with another in a distant part of the Nation be made secure. To place a direct tax

on one engaged in interstate commerce is to place a burden on interstate commerce, and once the right to do so is established by a decision of this Court or otherwise the right will be claimed and asserted by each of the forty-eight States and numerous county and municipal governments. Trade barriers of every kind and nature will in due time be set up and established. This result will be inevitable by reason of the diversity of conditions and interests which exist and will always exist in the several States of the Union. The need for, and the necessity of, these States for additional revenue will no doubt be proclaimed as the reason back of the enactment of tax laws, but ingenious and discerning minds will see in such a policy the opportunity of breaking down normal and orderly competition by establishing through the medium of tax laws, trade barriers beneficial to their particular business. The revenue producing power of such laws will in many instances become of secondary importance and consideration. The right of the individual to purchase and to trade in the open market of the Nation will be circumscribed and hedged about by the laws of the respective States.

We are not here concerned with the amount of the tax imposed but we are vitally concerned in the maintenance of a wise and well-established rule of constitutional law, established and adhered to by this Court down through the years. The question here at issue is of vital importance to the individual citizen wheresoever he may live in this Union. It is likewise of vital and far reaching importance to the Nation as a whole. Wise, indeed, is that provision of the Constitution which vests in the Congress the power to regulate interstate commerce. The Congress being a national legislative body acts or should act at all times in the interest of the Nation as a whole. This has never been true of the forty-eight State legislatures which legislative bodies by necessity must act separately and in a manner

best suited to the advancement of the interest of the respective States. The imposition of a tax on interstate commerce is but an indirect method of regulating such commerce. State and municipal tax laws however lenient they may be, will nevertheless operate as a burden upon and a regulation of interstate commerce. Such power if and when exercised will ultimately lead to confusion and will retard, hamper and throttle the normal flow of interstate commerce into the various States of the Union.

This Court has heretofore recognized the fact that it was "the mutual jealousies and agressions of the States taking form in customs barriers and other economic retaliation" which was the chief occasion of the Commerce Clause of the Constitution of the United States. *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55, 60 (1935).

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944, 949 (1938) this Court in the majority opinion, speaking through Mr. Justice, now Mr. Chief Justice Stone, recognized the fact that "the multiplication of State taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. * * *" This statement is equally true of a license tax imposed by a State or municipality for the privilege of carrying on interstate commerce. It is, as this Court has repeatedly held, a tax and a burden upon interstate commerce that is prohibited by the Commerce Clause of the Constitution of the United States. If States and municipalities are now to be authorized to impose fixed-sum license taxes for the privilege of carrying on interstate commerce the doom of interstate commerce has commenced.

It cannot be believed that this great Court, familiar with the history of the causes that brought about the adoption of the Commerce Clause of the Constitution, will tear up and destroy that interpretation of the Commerce Clause under which interstate commerce has flourished and the Nation thrived in order to permit the States and their municipal governments to throttle and destroy such commerce. Already the Commonwealth of Virginia requires of petitioner a franchise tax on its capital, an income tax on its net income, automobile license taxes on the motor vehicles used in its business, gasoline taxes on the fuel consumed in such vehicles, taxes on its bank deposits, and probably other taxes, all of which are recognized as legitimate burdens upon, and which add to petitioner's expense in carrying on interstate commerce; but there is no occasion in justice for the imposition on petitioner of additional taxes in the guise of licenses imposed solely for the privilege of carrying on interstate commerce, the multiplication of which by the municipalities of Virginia will inevitably 'spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the Commerce Clause to remove. * * *"

It is, therefore, respectfully submitted that petitioner is entitled to a writ of certiorari and that the judgment of the Supreme Court of Appeals of Virginia complained of should be reversed and annulled.

M. A. Hutchinson,
Counsel for Christian Corporation.

Office - Supreme Court, U. S.
FILED
JAN 21 1942
CHARLES ELMORE CROPLEY
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(2)

In the Supreme Court of the United States

OCTOBER TERM 1941

315 U.S. 801

No. 812

CHRISTIAN CORPORATION, PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA and THE CITY OF RICHMOND

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ABRAM P. STAPLES,
Attorney General for the Commonwealth of Virginia.

W. W. MARTIN,
Assistant Attorney General for the Commonwealth of Virginia.

HORACE H. EDWARDS,
City Attorney for the City of Richmond, Virginia.

HENRY R. MILLER, JR.,
Assistant City Attorney for the City of Richmond, Virginia.

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This brief is filed on behalf of respondents, Commonwealth of Virginia and the City of Richmond, in opposition to the granting of the writ of certiorari prayed for in the petition for the reason that the case presents no Federal question of substance decided by the court below not heretofore determined by this court.

OPINIONS BELOW

The Virginia Supreme Court of Appeals of Virginia did not deliver a written opinion inasmuch as it refused a writ of error to the judgment of the trial court (R. 32), which action of the court below will probably be recorded in volume 178 of the official Virginia reports. The Opinion of the judge of the trial court appears at page 30 of the Record.

GROUNDS OF JURISDICTION

Petitioner in the trial court challenged the validity of the license taxes assessed against it by the Commonwealth of Virginia and the City of Richmond pursuant to section 174 of the Tax Code of Virginia[1] (Acts of Assembly 1928, p. 111) and section 22 of Chapter 10 of the Richmond City Code 1937, respectively as being contrary to local law and in violation of the Commerce Clause of the Constitution of the United States. Both contentions were decided against petitioner by the trial court (R. 30), and a writ of error was refused by the court below (R. 32), the only error assigned in the petition to the Supreme Court of Appeals of Virginia for such writ of error being the alleged violation of the Commerce Clause (R. 3).

While petitioner does not so state, it is assumed that the petition to this court for a writ of certiorari is pursuant to section 237 of the Judicial Code, as amended.

STATEMENT OF THE CASE

Facts

Petitioner is a Virginia corporation with its only office in the State-Planters Bank Building, Richmond, Virginia (R. 9, 17, 18). It is engaged in the business of soliciting and taking written and oral orders in Virginia for the products of a number of manufacturers; such orders, taken subject to acceptance or rejection by petitioner's principal, are forwarded to the principal and, if accepted, the goods are shipped by the principal

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[1]The statute and ordinance are printed in full in an appendix hereto.

from the place of manufacture direct to the purchaser in Virginia,[2] the principal attending to all matters in connection with shipping, invoicing and collecting; for its services petitioner is paid at the end of each month a commission on all orders accepted by its principals (R. 11-13, 19-22).

Petitioner's principals in 1939 and 1940 were, with one exception, non-residents of Virginia and during those years, with one exception, all shipments were made from without Virginia to purchasers in Virginia (R. 11, 12, 16, 17). Prior to 1939 petitioner sometimes represented Virginia principals (R. 23), and being in business "to make money" will represent any Virginia principals whose business is profitable (R. 22). Petitioner is an independent agent, not an employee of any of its principals, and it may take on such new principals and drop such old ones as it sees fit (R. 23-24).

Petitioner's business is conducted through its Richmond office where all its records are kept including copies of the orders taken by it and confirmations thereof, and of invoices sent out by its principals (R. 17, 19-22, 24).

In April, 1940, petitioner was assessed with and paid a State license tax of $175.90 for that year as a commission merchant under section 174 of the Tax Code (R. 7, 14, 15). In July, 1940, petitioner was assessed with (but has not paid) a Richmond City license tax, including penalty, of $118.21 for that year as a sales agent under section 22 of Chapter 10 of the Richmond

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[2]A few shipments are made to North Carolina purchasers (R. 18, 19), but petitioner makes no point of the fact (R. 1, 6, 9; Petition 2; Petitioner's Brief 14). The case has been treated throughout as if Virginia purchasers only were involved. Indeed it is stipulated that the *amount* of the tax is correct (R. 14).

City Code 1937 (R. 9, 15, 25). The statute and ordinance involved each impose for any year a graduated tax (with a prescribed minimum) based upon the amount of commissions received during the preceding year. There is no controversy as to the amount of the tax (R. 14).

Question Presented

In the trial court petitioner contended, in addition to the alleged violation of the Commerce Clause, that it was not carrying on the business of a commission merchant as that business is defined in section 174 of the Tax Code of Virginia and thus was not subject to the license tax imposed by the section (R. 7).[3] This contention was decided against petitioner (R. 30), and the action of the trial court was not assigned as error in the petition to the court below for a writ of error (R. 3), nor, of course, is it urged here. The sole question here presented is the allegation of petitioner that the State and City license taxes involved "deprive it of a right to which it is entitled under the Commerce Clause of the Constitution of the United States." Petition, p. 10.

SUMMARY OF ARGUMENT

The challenged non-discriminatory State and City license taxes, which cannot be repeated in form or substance in or by other States, laid upon the purely local activities of petitioner in negotiating for its principals sales to Virginia buyers are not inconsistent with the

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[3]Petitioner did not contend that it was not a sales agent within the meaning of the city ordinance. (R. 9.)

power of the Congress to regulate commerce among the several States.

Western Live Stock v. *Bureau of Revenue,* 303 U. S. 250 (1938).

McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940).

McGoldrick v *Felt & Tarrant Mfg. Co.,* 309 U. S. 70 (1940).

McGoldrick v. *A. H. Du Grenier, Inc.,* 309 U. S. 70 (1940).

Graybar Electric Co. v. *Curry,* 308 U. S. 513 (1939); *id.,* 238 Ala. 116.

American Manufacturing Co. v. *St. Louis,* 250 U. S. 459 (1919).

Ficklen v. *Shelby County Taxing Dist.,* 145 U. S. 1 (1892).

Woodruff v. *Parham,* 8 Wall. 123 (1869).

State v. *Stein,* 240 Ala. 324 (1941); Certiorari denied, 313 U. S. 562 (1941).

ARGUMENT

Petitioner is engaged in business not as an employee, but as an independent agent, representing such principals as it elects, in soliciting orders on commission for such principals from Virginia purchasers. Petitioner's only office or place of business is in Richmond, Virginia, and while its principals in 1939 and 1940, with one exception, were located without Virginia, petitioner had nothing to do with accepting or rejecting such orders nor with shipping the goods in interstate commerce to Virginia nor with invoicing or collecting for

them. The activities of petitioner begin and end in Virginia and all the events upon which the taxes are conditioned take place in Virginia. The taxes are not subject to the objection raised against taxes imposed upon gross receipts from interstate transportation of goods, nor can they in form or substance be imposed in or by any other State so as to result in an additional burden upon the interstate distribution of manufactured products. While the taxed activities may cause or result in interstate commerce, the taxes in no way discriminate against such commerce, nor are they of such a nature as may be used as "an instrument of discrimination against interstate or foreign commerce."

It is submitted that the cases heretofore cited, notably *McGoldrick* v. *Berwind-White Coal Mining Co., supra, Western Live Stock* v. *Bureau of Revenue, supra,* and *Graybar Electric Co.* v. *Curry, supra,* make it abundantly clear that the taxes above described do not impose a prohibited burden upon interstate commerce.

While not alleging that any other State may duplicate the challenged taxes, petitioner asserts that by virtue of section 296 of the Tax Code of Virginia (Acts of Assembly 1928, p. 186), it might be subjected to multiple local taxation by each of the cities and towns of the State "if he undertook to carry on his business in all parts of the Commonwealth as he clearly has a right to do." (Petitioner's Brief, pp. 28-30.) The record does not show that any other locality in Virginia has taxed petitioner's business, nor is its prediction of potential multiple local taxation supported by section 296 of the Tax Code. This section (quoted in full in petitioner's brief, pp. 28, 29) provides in effect that a city or town may require a license for the carrying on of a business therein where a State license is required

for such business. But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that "every license granting authority to engage in * * any business * * shall designate the place of such business * * at some specified house or other definite place within the county or city * *." There is no State license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case. Therefore, since petitioner has no place of business in Virginia except in Richmond (R. 17, 24), no other locality in the State can require it to secure a local license for soliciting orders therein or as a commission merchant under the authority of section 296 of the Tax Code of Virginia. Of course, if petitioner established an office in another city or town in the State, such city or town could impose a license tax on the business of that office, but even then there would be no duplication of tax, for the tax would be measured by the commissions on the business of that office, not including the commissions on the business of the Richmond office. Petitioner's assertion of potential multiple taxation is absolutely without support either in fact or law.

Petitioner's principal reliance (Petitioner's Brief, pp. 17-25) seems to be in *Stockard* v. *Morgan*, 185 U. S. 27 (1902) wherein this court struck down *fixed sum* State and local Tennessee license taxes imposed on a merchandise broker whose method of doing business was substantially the same as petitioner's except in one important respect. Without attempting to appraise the

present day vitality of the authority of *Stockard* v. *Morgan, supra,* it is pointed out that in that case the broker dealt only with non-resident principals and, as the opinion said, "did not represent or assume to represent any residents of the State of Tennessee * *", a fact which was the principal ground for distinguishing the case from *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1 (1892), wherein the validity of a local Tennessee license tax on a merchandise broker doing practically the same business as dsecribed in *Stockard* v. *Morgan, supra,* was sustained, except that Ficklen, while his principals happened to be non-residents in the year involved, held himself out to do a general commission business for both resident and non-resident principals. And so with petitioner here, while its principals were, with one exception, non-residents in 1939 and 1940, this has not always been the case and it will represent any principal, resident or non-resident, whose business is profitable, and the petitioner consequently needs and is liable for the unrestricted license granted under the statute and ordinance here involved. It is clear, therefore, that under the facts present the *Ficklen* case, and not that of *Stockard* v. *Morgan, supra,* controls.

Finally, reference is made to the case of *State* v. *Stein,* 240 Ala. 324 (1941), wherein writ of certiorari was denied by this court on April 7, 1941. *Stein* v. *State,* 313 U. S. 562. In that case Stein was assessed with an Alabama State license tax as a merchandise broker or commission merchant for doing business (almost identical with petitioner's) described by the Alabama court (page 325 of 240 Alabama Reports) as follows:

> "Stating generally the effect of the agreed statement of facts, it will be noted that Stein

> has been engaged in the brokerage business in the City of Mobile since October, 1937, under the firm name or style of 'Stein Brokerage Company, Merchandise Broker.' Stein negotiated contracts with *bona fide* wholesale grocers, with certain definite principals, all of whom have their place of business without the State of Alabama. Stein represented only such principals as were satisfactory to him, and for his services received a commission based on the sale price of goods purchased, which said commission was remitted at the conclusion of each month for business done during that month by said Stein in the City of Mobile, Alabama."

The Alabama court, relying upon *Western Live Stock* v. *Bureau, supra; McGoldrick* v. *Berwind-White Coal Mining Co., supra,* and *Graybar Electric Co.* v. *Curry, supra,* sustained the tax and the Federal question presented on the petition for certiorari to this court was precisely that now presented by petitioner. Although the opinion of the Alabama court does not disclose that Stein held himself out to represent any resident principals, as does petitioner here, yet a writ of ceritorari was denied as above stated.

CONCLUSION

For the reasons stated it is submitted that petitioner does not present a case wherein the court below has decided a Federal question of substance contrary to the applicable decisions of this court, but on the contrary the only Federal question presented has been decided by

the State court in line with the decisions of this court, and that, therefore, the petition for a writ of certiorari in this case should be denied.

ABRAM P. STAPLES,
Attorney General for the Commonwealth of Virginia.

W. W. MARTIN,
Assistant Attorney General for the Commonwealth of Virginia.

HORACE H. EDWARDS,
City Attorney for the City of Richmond, Virginia.

HENRY R. MILLER, JR.,
Assistant City Attorney for the City of Richmond, Virginia.

APPENDIX

The Tax Code of Virginia (Acts of Assembly, 1928, page 111):

"Sec. 174. Commission merchants and brokers.—Every person, firm or corporation, doing business in this State who receives or distributes provisions and merchandise, including flour, hay or grain, shipped to such person, firm or corporation for distribution on account of the shipper, or who participates in the profits ensuing from or accruing out of the sales of such provisions or merchandise, including flour, hay or grain, or who invoices such sales or collects the money therefor, shall be deemed to be a broker who receives or distributes provisions and merchandise, including flour, hay, or grain.

"Every person, firm or corporation, buying or selling for another any kind of merchandise, on commission, except associations or organizations of farmers, including produce exchanges, organized and maintained by farmers for mutual help in the marketing of their produce and not for profit, shall be a commission merchant. Any person, firm or corporation licensed as a commission merchant may sell any personal property which may be left with, or consigned to him for sale, except gold or silver coin, bonds, certificates of public or private debts or other securities; provided, however, that any such merchant may sell gold or silver coin, certificates of public or private debts or other securities, by taking out the license therefor prescribed in the case of stock brokers.

"Every person, firm or corporation shall pay for the privilege of transacting the business of a commission merchant or broker the sum of fifty dollars, provided the commissions for the preceding year did not exceed one thousand dollars, but when the commissions exceeded one thousand dollars, the tax shall be fifty dollars, and an additional tax at the rate of one dollar for each hundred dollars, or fraction thereof, of commissions in excess of one thousand dollars, and if the license is to include the privilege of selling gold or silver coins, bonds, certificates of public or private debts, or other securities, there shall be paid, in addition, the amounts required in each case to be paid by stock brokers and in like manner.

"The license tax on every commission merchant or broker beginning business shall be the flat tax above prescribed, plus a tax in accordance with the foregoing scale measured by the commissions which it is estimated he will receive from the time he commences business to the following December thirty-first."

Richmond City Code, Chapter 10:

"Sec. 22. AGENTS—Sales Agents or Agencies.—Persons, firms or corporations engaged in business as sales agents or agencies, $50.00, and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. (December 15, 1933.)"